

Attorney for the Labor Commissioner

JASON BEHR,

Petitioners,

vs.

MARV DAUER & ASSOCIATES, and  
MARV DAUER,

Respondents.

The original Determination of Controversy was issued and served on the parties on June 19, 2001. A portion of text was omitted from the original determination, creating culpability for otherwise protected activity. The amended portion to the text is highlighted and found at page 9 lines 19-22 and 27-28. The remaining Conclusions of Law and the Order are unaffected.

The above-captioned petition was filed on July 13, 2000,

1 by JASON BEHR, (hereinafter "BEHR" OR "Petitioner"), alleging that  
2 MARV DAUER dba MARV DAUER & ASSOCIATES, (hereinafter "DAUER" or  
3 "Respondent"), was acting as an unlicensed talent agent in  
4 violation of Labor Code §1700.5<sup>1</sup>. Petitioner seeks a determination  
5 voiding *ab initio* the 1993 management agreement between the parties  
6 and requests disgorgement of all commissions paid to respondent  
7 arising from this agreement.

8 Respondent filed his answer with this agency on May 1,  
9 2000, denying any illegal conduct, and seeks a determination from  
10 the Labor Commissioner that the management agreement between the  
11 parties is enforceable for all purposes. A hearing was scheduled  
12 before the undersigned attorney, specially designated by the Labor  
13 Commissioner to hear this matter. After several continuances, The  
14 hearing commenced on February 5, 2001, and was completed on March  
15 6, 2001, in Los Angeles California. Petitioner was represented by  
16 Michael B. Garfinkel of Rintala, Smoot, Jaenicke & Rees, LLP;  
17 respondent appeared through his attorney J.T. Fox. Due  
18 consideration having been given to the testimony, documentary  
19 evidence and arguments presented, the Labor Commissioner adopts the  
20 following determination of controversy.

#### 21 FINDINGS OF FACT

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23  
24 1. On February 10, 1993, the parties entered into a  
25 management agreement. In return for 15 percent of petitioner's  
26 gross earnings as an actor for all entertainment related

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27 <sup>1</sup> All statutory citations will refer to the California Labor Code unless  
28 otherwise specified.

1 activities, the respondent would act as petitioner's sole and  
2 exclusive personal manager. The original contract was for two  
3 years, and four (4), one (1) year options, all exercised by the  
4 respondent. The relationship lasted until April 15, 1999, when  
5 Behr terminated Dauer's services.

6           2. Behr alleges that throughout the length of the  
7 agreement, Dauer attempted to procure employment opportunities on  
8 his behalf. Behr opines that these actions on his behalf were done  
9 illegally without a California talent agency license and  
10 consequently the agreement should be voided *ab initio*.

11           3. The relationship began in Minnesota where an  
12 introduction was made between the parties. The petitioner was  
13 nineteen years old and aspiring to move to California in pursuit of  
14 an acting career. The respondent instructed Behr that if he did  
15 move to California, Behr should contact the respondent when he  
16 arrived. Behr did. And within 48 hours of moving to California  
17 and visiting the respondent's office, Dauer introduced Behr to  
18 Conan Carroll of The Artists Group. The Artists Group, a licensed  
19 talent agency, immediately offered Behr a contract to act as his  
20 agent, which he instantly accepted. Two days later, the parties  
21 signed the management agreement. After two days in California,  
22 Behr possessed an agent, a manager and was on his way to television  
23 success.

24           4. Throughout the relationship, Behr was continuously  
25 represented by a licensed talent agent. His agency representation  
26 changed several times, but never lapsed. Irrespective of perpetual  
27 agency representation, Behr testified that Dauer utilized his many  
28 connections in the entertainment industry to secure several

1 auditions without the assistance or knowledge of Behr's agents.

2           5. Dauer possesses a well-regarded reputation in the  
3 soap opera industry and has established close personal relations  
4 with various soap opera casting directors. Behr argued that these  
5 connections in the industry enabled Dauer to bypass the talent  
6 agent and seek auditions directly through Dauer's casting agent and  
7 producer friends. Behr testified that he personally witnessed  
8 Dauer directly seek soap opera auditions on his behalf without the  
9 knowledge of the talent agent and maintained that Dauer often told  
10 Behr he directly arranged soap opera auditions. Behr also argued  
11 that Dauer scoured the daily breakdowns, discussed these possible  
12 roles with casting agents on Behr's behalf and by doing so, we must  
13 conclude that Dauer acted as a talent agent.

14           6. After several witnesses and impeachment documents  
15 were offered into evidence by the respondent, Behr's credibility  
16 was severely called into question and this hearsay testimony based  
17 on circumstantial evidence, absent supporting documents or  
18 testimony was unconvincing. The petitioner's credibility was not  
19 the only party whose testimony was unreliable. The respondent was  
20 also impeached several times and his self-serving, often  
21 contradictory testimony was unable to establish his defense and  
22 ultimately confirmed his culpability.

23           7. In prior sworn deposition testimony, Dauer admitted  
24 that he introduced his clients to "major producer[s] of films" for  
25 meetings, but was unable to provide an explanation why he would do  
26 so, other than stating, "it was just a meeting. It wasn't going to  
27 be a film or anything. [sic] Just to meet him." This explanation  
28 was not believable. Mr. Dauer introduced his clients to major

1 producers and the reason he did, was to get his clients employment.

2           8. The Labor Commissioner is mindful that holding Dauer  
3 in violation of the Talent Agencies Act, simply for introducing his  
4 clients to a "major producer of films" without further inquiry, may  
5 interfere with the constitutionally protected principles of freedom  
6 of association. The Labor Commissioner will not enforce laws that  
7 restrain Dauer's exercise of his rights protected by the first and  
8 fourteenth amendments. To do so would be an impermissible holding,  
9 exceeding the scope and authority entrusted to this administrative  
10 proceeding. But this holding is not based solely on one  
11 introduction of a client to a friend. Other factors taken in  
12 conjunction with Dauer's admitted behavior provide the basis for a  
13 conclusion that Dauer engaged in illegal activity.

14           9. Dauer also admitted that if he had a better  
15 relationship with a casting director than Behr's talent agent, he  
16 would directly contact the casting director. Dauer added he would  
17 do this only if requested to do so by the agent, ostensibly seeking  
18 protection under Labor Code §1700.44(d)<sup>2</sup>. Dauer also added, he  
19 would discuss auditions with casting directors if the casting  
20 director was unable to contact the agent. Again, the explanation  
21 following Dauer's admissions were not credible.

22           10. Clearly, Mr. Dauer has established a large network  
23 of industry executives, friends and associates from which he draws  
24 on. The frequency and to what extent he draws on these contacts  
25 were not established, but his ability to garner friends and utilize

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26           <sup>2</sup> Labor Code §1700.44(d) states, "it is not unlawful for a person or  
27 corporation which is not licensed pursuant to this chapter to act in conjunction  
28 with and at the request of a licensed talent agency in the negotiation of an  
employment contract."

1 those friendships for the benefit of his clients was.

2           11. In one such case, Dauer testified that he and his  
3 friend of many years, James Woods, always kept business and  
4 friendship apart. Dauer testified that he would never discuss  
5 business with Woods because commingling his business with his  
6 friend would compromise the relationship. Dauer went to great  
7 lengths to establish this fact, until it was elicited that several  
8 of his clients worked on Mr. Woods latest film. In fact, Behr  
9 introduced evidence that Dauer obtained an audition for Behr for  
10 the Woods movie "Race to Space". In support of the conclusion that  
11 Dauer created an audition opportunity for Behr, was the testimony  
12 of Behr's talent agent. Jeff Witjas testified that he was Behr's  
13 point agent at William Morris, and it is inconceivable if William  
14 Morris was involved, that Behr would have had an audition for a  
15 film without his knowledge. Witjas testified he absolutely had no  
16 knowledge of this audition, thus establishing that William Morris  
17 was not involved. The casting director and producer for the film,  
18 Joey Paul, testified unconvincingly that she utilized a William  
19 Morris liaison to handle all of the William Morris talent on the  
20 film, but that testimony was contradicted by the credible testimony  
21 of Witjas. If Behr's agent was not involved, the only logical  
22 conclusion that can be drawn is Dauer created this audition  
23 opportunity.

24           12. Notably, Joey Paul testified that she called Dauer  
25 and wanted to meet him because he had a reputation for handling  
26 quality talent. Dauer then visited Paul and soon thereafter three  
27 of Dauer's clients were slotted to appear on the Woods film. The  
28 totality of the evidence demonstrated that Dauer introduced his

1 clients to casting directors and producers; called casting  
2 directors directly if his relationship with the casting director  
3 was better than that of the agent; and if the agent was  
4 incommunicado, Dauer would set the auditions directly with his  
5 artist.

6           13. The petitioner sought to establish that Dauer made  
7 a pattern and practice of setting up auditions for Behr. That was  
8 not accomplished. To Dauer's credit, he did obtain the agent for  
9 Behr, encouraged constant agency representation and did not conduct  
10 talent agent endeavors throughout the majority of the relationship,  
11 with the exception of the aforementioned activities on the  
12 occasional basis by his own acknowledgment.

13           14. In 1998 Behr was eventually cast in a lead role  
14 for the WB's new hit series "Roswell". The petitioner continued to  
15 make commission payments and on April 15, 1999, Behr terminated  
16 Dauer's services and at some point thereafter ceased commission  
17 payments. Dauer filed a superior court breach of contract lawsuit  
18 against Behr seeking unpaid commissions. In response, Behr filed  
19 this petition requesting the contract be deemed illegal and  
20 unenforceable. The superior court action was stayed pending the  
21 results of this petition.

22  
23                           CONCLUSIONS OF LAW

24  
25           1. Labor Code §1700.4(b) includes "actors" in the  
26 definition of "artist" and petitioner is therefore an "artist"  
27 within the meaning of §1700.4(b).

28           2. The primary issue is whether based on the evidence

1 presented at this hearing, did the respondent operate as a "talent  
2 agency" within the meaning of §1700.40(a). Labor Code §1700.40(a)  
3 defines "talent agency" as:

4  
5 "a person or corporation who engages in the occupation of  
6 procuring, offering, promising, or attempting to procure  
employment or engagements for an artist or artists."

7 3. Labor Code section 1700.5 provides that "no person  
8 shall engage in or carry on the occupation of a talent agency  
9 without first procuring a license therefor from the Labor  
10 Commissioner."

11 4. In Waisbren v. Peppercorn Production, Inc (1995) 41  
12 Cal.App.4th 246, the court held that any single act of procuring  
13 employment subjects the agent to the Talent Agencies Act's  
14 licensing requirements, thereby upholding the Labor Commissioner's  
15 long standing interpretation that a license is required for any  
16 procurement activities, no matter how incidental such activities  
17 are to the agent's business as a whole. Applying Waisbren, it is  
18 clear respondent acted in the capacity of a talent agency within  
19 the meaning of §1700.4(a).

20 5. Respondent argued the petitioner did not establish a  
21 violation by "clear and convincing" evidence and consequently has  
22 not met his burden of proof. The proper burden of proof is found  
23 at Evidence Code §115 which states, "[e]xcept as otherwise provided  
24 by law, the burden of proof requires proof by preponderance of the  
25 evidence." Further, McCoy v. Board of Retirement of the County of  
26 Los Angeles Employees Retirement Association (1986) 183 Cal.App.3d  
27 1044 at 1051 states, "the party asserting the affirmative at an  
28 administrative hearing has the burden of proof, including both the



1 initial burden of going forward and the burden of persuasion by  
2 preponderance of the evidence(cite omitted). "Preponderance of the  
3 evidence" standard of proof requires the trier of fact to believe  
4 that the existence of a fact is more probable than its  
5 nonexistence. In re Michael G. 74 Cal.Rptr.2d 642, 63 Cal.App.4th  
6 700.

7           6. The petitioner has established by a preponderance of  
8 the evidence that the respondent procured employment by contacting  
9 casting agents and producers directly in connection with securing  
10 auditions for Behr. The respondent miscalculated the scope in  
11 which he could deal with perspective employers. Dauer believed  
12 that if the agent is unavailable, a manager could discuss the role  
13 with the casting director, set up the audition and contact the  
14 artist to inform him of the time, place and circumstance  
15 surrounding the tryout. Also Dauer assumed if he had a favorable  
16 relationship with a casting director or producer and was instructed  
17 by the agent to discuss a potential role with that casting director  
18 or producer, that those types of communications would be protected.  
19 They are not, **absent convincing testimony from the artist's agent**  
20 **that the agent instructed the manager to conduct those specific**  
21 **communications. That convincing testimony was absent from this**  
22 **proceeding.**

23           A clear line must be drawn and managers must shield  
24 themselves from activities that may be construed as attempting to  
25 procure employment. The act of discussing roles with casting  
26 directors and contacting casting directors directly on behalf of an  
27 artist, **absent testimony an agent requested each and every alleged**  
28 **improper communication, is a violation of the Talent Agencies Act.**

1                   7.     In 1982, AB 997 established the California  
2 Entertainment Commission. Labor Code §1702 directed the Commission  
3 to report to the Governor and the Legislature as follows:  
4

5                   "The Commission shall study the laws and  
6 practices of this state, the State of New  
7 York, and other entertainment capitals of the  
8 United States relating to the licensing of  
9 agents, and representatives of artists in the  
entertainment industry in general,...., so as  
to enable the commission to recommend to the  
Legislature a model bill regarding this  
licensing."

10                  8.     Pursuant to statutory mandate the Commission studied  
11 and analyzed the Talent Agencies Act in minute detail. The  
12 Commission concluded that the Talent Agencies Act of California is  
13 a sound and workable statute and that the recommendation contained  
14 in this report will, if enacted by the California Legislature,  
15 transform that statute into a model statute of its kind in the  
16 United States. All recommendations were reported to the Governor,  
17 accepted and subsequently signed into law.

18                  9.     The major, and philosophically the most difficult,  
19 issue before the Commission, the discussion of which consumed a  
20 substantial portion of the time was whether a personal manger, or  
21 anyone other than a licensed Talent Agent may procure employment  
22 for an artist without obtaining a talent agent's license from the  
Labor Commissioner? (Commission Report p. 15)

23                  10.    The Commission considered and rejected alternatives  
24 which would have allowed the personal manager to engage in "casual  
25 conversations" concerning the suitability of an artist for a role  
26 or part, and rejected the idea of allowing the personal manager to  
27 act in conjunction with the talent agent in the negotiation of  
28

1 employment contracts whether or not requested to do so by the  
2 talent agent. (Commission Report P. 18-19)

3 13. As noted, all of these alternatives were rejected  
4 by the Commission. The Commission concluded:

5 "[I]n searching for the permissible limits to activities  
6 in which an unlicensed personal manager or anyone could  
7 engage in procuring employment for an artist without  
8 being license as a talent agent, . . . there am no such  
9 activity, there are no such permissible limits, and that  
10 the prohibitions of the Act over the activities of anyone  
11 procuring employment for an artist without being licensed  
12 as a talent agent must remain, as they are today, total.  
13 Exceptions in the nature of incidental, occasional or  
14 infrequent activities relating in any way to procuring  
employment for an artist cannot be permitted: one either  
is, or is not, licensed as a talent agent, and, if not so  
licensed, one cannot expect to engage, with impunity, in  
any activity relating to the service which a talent agent  
is licensed to render. There can be no 'sometimes' a  
talent agent, just as there can be no 'sometimes' doctor  
or lawyer or any other licensed professional."  
(Commission Report P. 19-20)

15 14. The Commission was very clear in their conclusion  
16 that a personal manager may not negotiate an employment contract  
17 unless that negotiation is done "at the request" of a licensed  
18 talent agent. It is not enough, as indicated in the Commission's  
19 Report, that the talent agent grants overall permission. The agent  
20 must advise the manager or request the manager's activity for each  
21 and every submission. At the very minimum an agent must be aware  
22 of the manager's procurement activity. In our case, the testimony  
23 was clear that at times the petitioner spoke directly with casting  
24 agents that lead to auditions without the talent agents knowledge,  
25 and therefore, was not "at the request of" petitioners' licensed  
26 talent agent. Notably, the evidence did not establish the  
27 respondent acted in this fashion for the purpose of evading  
28 licensing requirements, however, to allow these activities to go

1 unregulated would create a gap in the Act that could be utilized to  
2 evade the Act's licensing requirements. This would defeat obvious  
3 legislative intent.

4           15. A bright line rule must be established to further  
5 legislative intent. Again, one either is an agent or is not. The  
6 person who chooses to manage an artist and avoid statutory  
7 regulation may not cross that line, unless that activity falls  
8 squarely within the narrow exception of §1700.44(d). Critics may  
9 argue that this rule works against an artist by discouraging  
10 creativity of a manager, which after all is conducted for the  
11 artist's benefit. Others may suggest this creates a chilling  
12 effect on the artists representatives working together in concert  
13 for the artist's benefit. Still others may argue this "bright-line  
14 rule" does not consider the realistic operations of the  
15 entertainment industry. Until case law or the legislature  
16 redirects the Labor Commissioner in carrying out our enforcement  
17 responsibilities of the Act, we are obligated to follow this path.

18           16. Behr seeks disgorgement of all commissions paid to  
19 the petitioner during the relationship between the parties. Behr  
20 filed his petition on July 13, 2000. Labor Code §1700.44(c)  
21 provides that "no action or proceeding shall be brought pursuant to  
22 [the Talent Agencies Act] with respect to any violation which is  
23 alleged to have occurred more than one year prior to the  
24 commencement of this action or proceeding." As a result, Behr is  
25 entitled to a return of commissions for any commissions paid to  
26 petitioner during the period of July 14, 1999, through July 13,  
27 2000.

28           17. The aforementioned 1993 written agreement and four

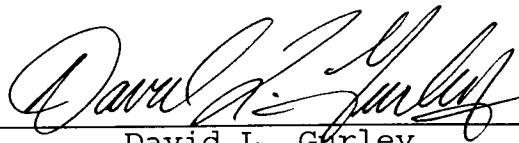
1 subsequent one-year options between respondent and petitioner are  
2 hereby void *ab initio* and are unenforceable for all purposes.  
3 Waisbren v. Peppercorn Inc., supra, 41 Cal.App. 4<sup>th</sup> 246; Buchwald  
4 v. Superior Court, supra, 254 Cal.App.2d 347.

7 ORDER

8 For the above-stated reasons, IT IS HEREBY ORDERED that  
9 the aforementioned contracts between petitioner JASON BEHR and MARV  
10 DAUER & ASSOCIATES, are unlawful and void *ab initio*. Respondent  
11 has no enforceable rights under that contract and its options.

12 The respondent must provide an accounting to petitioner  
13 within 30 days of this determination of all commissions received  
14 from petitioner during the period of July 14, 1999, through July  
15 13, 2000 and shall reimburse the petitioner for those monies within  
16 sixty (60) days from the date of this determination.

17  
18 Dated: 8/16/01

  
\_\_\_\_\_  
David L. Gurley  
Attorney for the Labor Commissioner

20  
21  
22  
23 ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER  
24

25  
26  
27 Dated: AUG 16 2001

  
\_\_\_\_\_  
13 THOMAS GROGAN  
Deputy Chief

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS - DIVISION OF LABOR STANDARDS ENFORCEMENT

**CERTIFICATION OF SERVICE BY MAIL**  
(C.C.P. §1013a)

**JASON BEHR VS MARV DAUER & ASSOCIATES, AND MARV DAUER**  
**SF 021-00            TAC 21-00**

I, Benjamin Chang, do hereby certify that I am employed in the county of San Francisco, over 18 years of age, not a party to the within action, and that I am employed at and my business address is 455 Golden Gate Avenue, 9<sup>th</sup> Floor, San Francisco, CA 94102.

On August 16, 2001, I served the following document:

**AMENDED DETERMINATION OF CONTROVERSY**

by facsimile and by placing a true copy thereof in envelope(s) addressed as follows:

**J. LARSON JAENICKE, ESQ.**  
**MICHAEL B. GARFINKEL, ESQ.**  
**RINTALA, SMOOT, JAENICKE & REES**  
**10351 SANTA MONICA BLVD., STE 400**  
**LOS ANGELES, CA 90025-6937**

**J.T. FOX, ESQ.**  
**ARTHUR BARENS, ESQ.**  
**LAW OFFICES OF ARTHUR H. BARENS**  
**10209 SANTA MONICA BLVD.**  
**LOS ANGELES, CA 90067**

and then sealing the envelope with postage thereon fully prepaid, depositing it in the United States mail in the city and county of San Francisco by ordinary first-class mail.

I certify under penalty of perjury that the foregoing is true and correct. Executed on August 16, 2001, at San Francisco, California.

  
BENJAMIN CHANG